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Federal Communications Commission

DA 93-824

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC MAIL SECTION

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MM Docket No. 93-212

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Goldsboro,
North Carolina, in the Raleigh-
Durham, North Carolina,
Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: July 8, 1993;

Released: July 15, 1993

Comment Date: August 23, 1993

Reply Comment Date: September 7, 1993

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed March 9, 1993, by Group H Broadcasting Corporation ("Group H"), licensee of television station WYED(TV), Channel 17 (Independent), Goldsboro, North Carolina. Group H seeks to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Raleigh-Durham, North Carolina, television market to "Raleigh-Durham-Goldsboro, North Carolina."¹

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. See 47 CFR §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. See

CATV-Non Network Agreements, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. See *Cable Television Report* 40 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."²

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),³ which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. See Section 614(f) of the Act.⁴ The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. In its petition, Group H contends that the current "Raleigh-Durham" market designation does not reflect the reality of the television market in that area and that adoption of the designation "Raleigh-Durham-Goldsboro" will facilitate equal competition among the local television stations with regard to cable television carriage and syndicated exclusivity and will assure that cable subscribers have access to all stations in the market. According to Group H, absent the requested amendment of Section 76.51, WYED will face inequitable application of compulsory copyright license liability because it is not considered a "local" station. That is, until and unless 76.51 is amended, a cable system will have to pay significant copyright royalties if it

¹ The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." See *Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

² See, e.g., *TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), citing *Major Television Markets (Fresno-Vidalia, California)*, 57 RR 2d 1122, 1124 (1985). See, also, *Press Broadcasting*

Company, Inc., 8 FCC Rcd 94, 95 (1993).

³ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁴ In connection with the implementation of the broadcast signal carriage provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Commission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider further revisions to the list of television markets on a case-by-case basis. See *Report and Order* in MM Docket No. 92-259, *supra*.

wants to carry WYED, and WYED will have to indemnify the cable system for those royalties, placing the station at a competitive disadvantage to other area stations.

6. In support of its proposal, Group H states that it meets all of the criteria delineated by the Commission for redesignation of the Raleigh-Durham market to include Goldsboro. Group H maintains that even though Goldsboro is approximately 51 miles from Raleigh, it serves substantially the same geographic areas as the stations in Raleigh and Durham. Group H states that its transmitter site is within 7 miles of three of the four stations licensed to Raleigh or Durham. Further, Group H contends that WYED's signal covers virtually all of the areas served by the other stations. Specifically, Group H claims that WYED places a city-grade signal over all of Raleigh and most of Durham, a Grade A signal over both Raleigh and Durham, and a Grade B signal over a majority of the Raleigh-Durham market, while three of the Raleigh-Durham stations place a Grade A signal over Goldsboro, and the fourth places a Grade B signal over that city. Finally, Group H argues that Arbitron includes Goldsboro in its Raleigh-Durham "area of dominant influence" (ADI), and other media (cable systems and newspaper television listings) as well as viewers and advertisers treat the communities as comprising one market. Group H thus maintains that redesignation of the market as proposed would extend the area in which Raleigh-Durham (and Goldsboro) stations are considered local signals, thus redefining the area in which those stations may assert territorial exclusivity, syndicated exclusivity and network nonduplication rights, and would also permit Raleigh-Durham area cable systems to carry WYED on an equal basis with other television stations in the market without incurring "distant signal" copyright liability.

7. Following the adoption of the *Report and Order* in MM Docket No. 92-259, *supra*, Group H requested that the Bureau give expedited consideration to its petition. In a letter dated April 19, 1993, Group H explains that adoption of new must-carry rules has heightened the importance of redesignating the Raleigh-Durham market. According to Group H, indemnifying just one of the cable systems in the area for the additional copyright liability the system will incur, will cost approximately \$100,000 per year. In light of the fact that copyright liability is determined every six months, and given that relief from such liability will have only prospective effect, Group H is asking that the Commission move swiftly so that it can avoid further copyright liability.

DISCUSSION

8. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rulemaking process, including the comments of interested parties. It appears from the information before us that WYED and stations licensed to communities in the Raleigh-Durham television market do compete for audiences and advertisers throughout much of the proposed combined market area, and that evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, Group H's proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

9. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

10. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **August 23, 1993** and reply comments on or before **September 7, 1993**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

11. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few television licensees and permittees will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

12. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau